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Nos. 89-56 and 89-101

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL J. FERRANTINO, SR., *et al.*,

*Petitioners*,

*v.*

THE COUNTY OF OAKLAND AND THE COUNTY OF MACOMB,

*Respondents*.

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COLEMAN A. YOUNG,

*Petitioner*,

*v.*

THE COUNTY OF OAKLAND AND THE COUNTY OF MACOMB,

*Respondents*.

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## BRIEF OF RESPONDENT OAKLAND COUNTY IN OPPOSITION

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August 14, 1989

## QUESTIONS PRESENTED

1. Whether counties that directly purchase sewage treatment services at illegally inflated prices lose their standing to sue under the antitrust laws and this Court's decision in *Hanover Shoe* when the money used to pay for the services is generated by fees that are ultimately collected from users of the counties' sewer systems.

2. Whether counties that directly purchase sewage treatment services at illegally inflated prices lose their standing to sue under the Racketeering Influenced and Corrupt Organizations Act when the money used to pay for the services is generated by fees that are ultimately collected from users of the counties' sewer systems.

## LIST OF PARTIES AND RULE 28.1 LISTING

The plaintiffs-appellants in the proceedings before the United States Court of Appeals for the Sixth Circuit were the County of Oakland and Macomb County; both are Michigan counties contiguous to the City of Detroit. Both counties are named as respondents to the Petitions addressed herein.

The defendant-appellees in the proceedings before the United States Court of Appeals for the Sixth Circuit were the City of Detroit, Detroit Mayor Coleman A. Young, Nancy Allevato (as Personal Representative of the Estate of Michael J. Ferrantino, Sr.), Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn, Michigan Disposal, Inc., Wayne Disposal, Inc., Wolverine Disposal, Inc., and Wolverine Disposal-Detroit, Inc. Two other defendants, Charles Beckham and Darralyn Bowers, were parties to the proceedings before the District Court but did not participate on appeal.

The present respondent, the County of Oakland, is a governmental entity that has no parent companies, subsidiaries, or affiliates as defined in Rule 28.1.

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## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF RESPONDENT OAKLAND COUNTY IN OPPOSITION

Oakland County ("Oakland" or "the county") hereby opposes the Petitions for Writ of Certiorari filed by Nancy Allevato et al. on July 13, 1989 ("Allevato Petition") and by Coleman A. Young on July 17, 1989 ("Young Petition") in the above-captioned actions. For the reasons set forth below, respondent respectfully requests that the Court deny both Petitions.[1]

[1]In addition, only 10 days before this Brief in Opposition was due to be filed, Oakland learned that the City of Detroit had filed a third Petition, No. 89-79, in this matter which had never been served upon any of the counsel representing Oakland. Not until August 8, 1989—the day before this Brief was due to be typeset—was that Petition served upon any of respondent's counsel and even then upon only one of the several counsel appearing for respondents below. Detroit's disregard of this Court's service rules has greatly prejudiced respondents.

Hence, Oakland has requested, by separately filed Memorandum, that this Court dismiss or deny the City's Petition for failure to comply with the rules. In any event, the City's Petition, like the other two Petitions, lacks merit for the reasons that follow.

## COUNTERSTATEMENT OF THE CASE

This is a civil action to recover treble damages under the federal antitrust and RICO laws from the convicted criminal defendants, general related corporations, the City of Detroit, and the Mayor of Detroit, due to alleged overcharges for sewage disposal services. The plaintiffs are two Michigan counties that paid inflated charges for sewage disposal services because of an alleged price-fixing conspiracy and kickback scheme commonly known as the "Vista" conspiracy. This conspiracy has been the subject of considerable litigation; indeed, many of the current petitioner/defendants pleaded guilty or were convicted of participating in the very scheme that is the subject of this civil action.

In the instant case, the district court dismissed the complaints on the ground that the counties, notwithstanding their status as direct purchasers of the tainted services, lacked standing to sue pursuant to the Supreme Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The United States Court of Appeals for the Sixth Circuit reversed,[2] finding that the plaintiff counties alleged sufficient injury to sue. The facts set forth below clearly demonstrate that the Sixth Circuit's decision was correct and that this Court's jurisdiction should not be invoked further to delay and obstruct plaintiffs' right to relief.

### I. The 1977 EPA Proceedings

In 1977, as is still the case, the City of Detroit operated a large waste water treatment plant that treated all sewage generated within the City of Detroit, as well as most of the sewage generated within outlying counties and municipalities. The plaintiff counties

[2]For this Court's convenience, Oakland will cite to the version of the Sixth Circuit decision set forth in Appendix A to the Allevato Petition, using the following citation form: "Decision at __ a."

purchased sewage treatment services from Detroit pursuant to contracts with the City.

In 1977, the United States sued Detroit in federal district court, alleging that Detroit was disposing of sewage in violation of the federal environmental laws. Eventually, the parties entered into a consent judgment. The United States, however, became dissatisfied with the pace at which Detroit moved toward compliance; consequently, in March 1979, the district court designated Detroit Mayor Coleman A. Young as "administrator" of the wastewater treatment plant, charging the Mayor with responsibility for bringing the City into compliance with the consent decree. Invoking its "broad range of equitable powers . . . to enforce and effectuate its . . . judgments," the court removed all functions relating to operation of the Detroit sewage treatment plant from the City's Board of Water Commissioners and City Common Council and instead concentrated all power in the Mayor. The court granted the Mayor "extraordinary" powers, including the power to waive competitive bidding requirements in awarding contracts and the power to operate "without the necessity of any actions on the part of the Common Council of the City of Detroit . . . " *United States v. City of Detroit*, 476 F. Supp. 512, 515, 520-521 (E.D. Mich. 1979). It is the manner in which the Mayor and his associates then chose to exercise these powers that is the subject of this action.

**II. The "Vista" Conspiracy**

On May 1, 1979, Detroit, through Mayor Young, signed a sludge disposal contract with defendant Michigan Disposal, Inc., a sludge hauling firm owned by the late Michael J. Ferrantino.[3] This contract covered a portion of the output of the Detroit wastewater treatment plant. The contract called for all sludge

[3]On February 3, 1983, the United States indicted Ferrantino for RICO violations (18 U.S.C. § 1362(c) & (d)) and mail fraud (18 U.S.C. § 1341). He was convicted on one RICO count in December 1983, but died in January 1984 before sentencing. His Estate is a defendant in this action and a petitioner in this Court through Nancy Allevato, the Estate's personal representative.

handled pursuant to the Michigan Disposal contract to be transported to a landfill owned by Wayne Disposal, Inc., another firm controlled by Ferrantino.

In 1980, Michigan Disposal made an unsolicited proposal for a second sludge hauling contract that would cover the balance of the output of Detroit's plant. The City initially rejected this proposal on the grounds that total dependence on a single sludge hauler would be bad policy. As the Sixth Circuit found below, Ferrantino then entered into a conspiracy with Darralyn Bowers, a close friend of Mayor Young's, to create a "front" company that would surreptitiously obtain the second contract. In conjunction with Walter Tomyn, Sam Cusenza, and Joseph Valentini, who were all employees of Ferrantino-controlled companies, Bowers and Ferrantino fabricated a company known as "Vista Disposal." Vista was held out as the sole proprietorship of one Jerry Owens, a man with no previous experience in the hauling and disposal industry. Vista then submitted a proposal that included false statements about Vista's ownership, Owens' experience, and other material facts. Vista's attorney, Charles Carson, and the director of the Detroit wastewater treatment plant, Charles Beckham, also participated in the plot to create Vista and the subsequent efforts to secure the city contract for Vista. Eventually, in response to City Council attempts to scrutinize the proposed award, the Mayor summarily used his court-conferred powers to award the contract to Vista without competitive bidding and without the City Council's approval.[4]

In 1980, the Federal Bureau of Investigation obtained information about the Vista scheme and began a massive investigation that included extensive court-ordered electronic surveillance. The FBI investigation led to the prosecution of each of the current

[4]The "Vista" conspiracy was endlessly more complex than can be detailed for purposes of this Brief. The history of the conspiracy is set forth in *United States v. Bowers*, 828 F.2d 1169, 1170-73 (6th Cir. 1987), *cert. denied*, __U.S.__, 108 S.Ct. 1731 (1988), the decision affirming Bowers' and Beckham's convictions.

defendants—except certain related corporations, the City, and the Mayor—all of whom either pleaded guilty or were convicted under the Racketeering Influenced and Corrupt Organizations Act (RICO) or the federal mail fraud statute.[5]

## III. The Sewage Disposal Systems Of Oakland and Macomb Counties

As noted above, the Detroit sewage system serves not only the incorporated city but also the outlying counties, including the current plaintiffs, the Counties of Oakland and Macomb. At the time the Vista conspiracy occurred, these counties had contracts with Detroit for the disposal of sewage generated within the counties. Complaint at ¶ 19 (attached as Appendix A to this Brief in Opposition). Those contracts provide that the counties' sewage will be transported to Detroit for treatment and eventual disposal at Detroit's wastewater treatment facility. Complaint at ¶ 5.[6] To facilitate disposal, Oakland has constructed and currently operates its own sewer system interceptors connecting municipal sewers with Detroit's interceptors. Affid. at ¶ 8. To provide these and related services, the county maintains a staff of approximately 150 persons. Affid. at ¶ 8.

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[5]Beckham, Bowers, Ferrantino, Cusenza, Valentini, and Carson were indicted in 1983 on various counts of RICO violations, conspiracy, mail fraud and, in Beckham's case, violation of the Hobbs Act. Bowers, Cusenza, and Ferrantino were each convicted in December 1983 of one count of RICO conspiracy; the court declared a mistrial as to all other defendants and all undecided counts. Ferrantino then died before sentencing or retrial. *See* note 3 *supra*.

Bowers, Beckham, Valentini, Carson, and Cusenza were again indicted on February 3, 1984; Cusenza, Valentini, and Carson then pleaded guilty to various counts, and Bowers and Beckham were retried and convicted on all counts. The history of the Bowers and Beckham criminal actions is set forth in *United States v. Bowers*, 828 F.2d at 1170-73.

[6]After the district court's initial ruling dismissing the Complaint, the counties filed a Petition for Reconsideration that included the Affidavit executed by Robert H. Fredericks II, the Chief Deputy Drain

*(Footnote continued on following page)*

Detroit charges Oakland for providing disposal services and is paid by Oakland whether the municipalities pay the county on time or in full. Affid. at ¶ 16(b). Oakland pays for the services and, in turn, charges its municipal and individual customers. Oakland therefore constitutes the direct purchaser of the tainted services. Affid. at ¶¶ 16(a), 16(b), 24; Complaint at ¶ 20.

Oakland, through its sewer districts, unilaterally sets the municipal rates, charging the municipalities for (a) costs incurred by the county under its contractual arrangements with Detroit, (b) costs incurred in operating and maintaining the county system, and (c) an allowance for reserves. Affid. at ¶ 16(a)(v). The computation of a particular municipality's bill is complex because the character of the information used in the allocation process varies widely from community to community. In some areas within Oakland County, for instance, there are no individual user meters or master meters to accurately record the flow of sewage. In the Clinton-Oakland sewer district, the allocation is based on estimated usage multiplied by a flat rate and adjusted by "a unit assignment factor." In the Evergreen-Farmington district, however, Oakland bills its municipalities based on meter readings where available and otherwise on assumed meter readings, applying a multiplication factor to the average metered readings. Affid. at ¶ 16(a)(ii). Oakland also charges some municipalities in the Evergreen-Farmington District a storm water fee that is added to the sewer bill. *Id.* Ratemaking complexity is compounded by the fact that several municipalities are located in two different sewer districts and therefore receive two different bills. Affid. at

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*(Footnote continued from previous page)*
Commissioner for Oakland County. The Fredericks Affidavit details the manner in which Oakland administers its sewage disposal system and pays its bills to Detroit. The Fredericks Affidavit also discusses the manner in which the various municipalities bill their end users and remit the sums due to the county. Finally, the Fredericks Affidavit discusses the various injuries inflicted by Detroit upon the county through imposition of the illegal overcharges. It is attached as Appendix B to this Brief and hereinafter cited as "Affid. at ¶ __."

¶ 16(a)(iv).[7] In addition to operating connecting sewers that link local municipal systems with the Detroit system, Oakland is also directly responsible for operating the local sewer systems in three incorporated cities and one village. Affid. at ¶ 17.

To fund its sewage disposal system, Oakland has issued bonds in its name for the construction of interceptor sewers and the lateral sewer systems connecting Oakland's own sewer interceptors to those of the various municipalities. Affid. at ¶¶ 9, 10. Oakland pledged its full faith and credit for those bonds. *Id.*

To administer its sewage system and pay its bills to Detroit, Oakland maintains in its own name a separate, segregated account ("enterprise funds") for each of the three sewer districts within its borders. Affid. at ¶ 16(b). All sewage fees collected from the municipalities are placed in the appropriate enterprise fund. *Id.* Oakland then pays Detroit's sewage treatment bills from these separate funds without regard to whether individual municipalities have paid their bills in full or on time. *Id.*

The municipalities connected to Oakland's interceptor sewers pay their sewage fees to the county and bill their individual residential and commercial customers pursuant to a procedure similar to that of the county; that is, the municipalities pay the county from their own segregated sewage funds, which consist of money collected from end users of the sewage system. Affid. at ¶ 23(c). The municipalities set the rates for system users within their jurisdiction; in doing so, they use the rate charged by the counties as a base rate and add to that their costs of maintaining the municipal sewage system. Affid. at ¶ 23(b).

Oakland has a responsibility to its constituent municipalities to obtain the lowest possible price for sewage disposal from Detroit. Affid. at ¶ 13. Consequently, it monitors Detroit's ratemaking deliberations and, since 1975, has challenged every major rate

[7]The billing process of Macomb County differs slightly. See Decision at 6a n.2.

increase by Detroit. Affid. at ¶ 14. Moreover, Oakland has greater resources and greater ratemaking expertise than the municipalities or end users. Affid. at ¶¶ 19, 26.

**IV. The Counties' Civil Action**

Oakland County filed the instant action in 1984, following the first wave of criminal prosecutions in the Vista conspiracy. Macomb soon intervened as an additional party plaintiff.[8]

The Complaints alleged that the defendants had, by means of the Vista conspiracy, conspired to violate the antitrust and racketeering laws by excluding competition, illegally fixing the price of sludge hauling, monopolizing the sludge hauling industry, and imposing illegal overcharges. Complaint at ¶¶ 44, 48, 52, 63–65, 68, 75, 81–82, 85. The effect of the conspiracy was to inflate the costs of sewage treatment drastically above the amount that would have resulted from a free and competitive bidding process. *Id.* at ¶¶ 49, 53, 66, 69, 76, 83, 86.

The Oakland Complaint alleged, and the Court of Appeals found, that the plaintiff counties were the direct purchasers of the disputed services. The Complaint specifically alleged injury to the counties resulting from the illegal acts charged:

> Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of [Detroit Wastewater Treatment Plant] sludge caused by Defendants' unlawful conduct.

Complaint at ¶ 49. Defendants' unlawful inflation of sewage prices resulted in the dissipation of the counties' enterprise funds.

Without answering the Complaint, defendants moved for dismissal pursuant to Rule 12(b) on a variety of grounds, including

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[8]Macomb's Complaint essentially incorporated by reference the allegations of Oakland's Complaint. All references herein are to Oakland's Complaint.

the assertion that plaintiffs lacked standing because they "passed on" the alleged injury to end users. The district court granted the motion, finding that plaintiffs lacked standing, and denied subsequent motions to alter judgment. The court found, in essence, that the counties, while literally the "direct purchasers" of the tainted services, were "mere conduits" that pass through their entire injury to the indirect purchasers of the services.[9] The district court thus held that defendants had met requirements of the "pass-on" exception mentioned in this Court's *Illinois Brick* and *Hanover Shoe* decisions.

**V. The Court of Appeals' Decision**

The United States Court of Appeals for the Sixth Circuit subsequently reversed the District Court's decision on all grounds relevant to these Petitions, finding that the counties did indeed have standing under Article III of the Constitution, as well as under the antitrust and RICO laws.[10]

First, the Court of Appeals recognized that the counties are the direct purchasers of the services at issue, notwithstanding that, in the context of ratemaking, they have been described as "mere conduits" for sewage charges owed to the City of Detroit. *See* Decision at 10a-11a. As the court noted, even defendants concede that the counties are the parties who entered into the contracts at issue and paid the bills to Detroit; hence, for purposes of determining antitrust and RICO standing, "the counties certainly are buyers." Decision at 11a.

The Court of Appeals then held that, as direct purchasers of tainted goods, the counties clearly suffered "injury in fact," and thus satisfied Article III standing requirements. The Court of

[9]*See* District Court decision granting defendants' motion for summary judgment, Allevato Petition at 32a-35a; District Court decision denying motion to alter judgment, Allevato Petition at 41a-46a.

[10]Also at issue in the appeal were certain ancillary discovery issues and an issue regarding the Mayor's fiduciary duty. Those issues are not raised in the instant Petitions.

Appeals observed that this Court's recent decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), decisively rejected the argument that a direct purchaser loses its constitutional standing merely by virtue of its ability to pass through a portion or all of the charge. Decision at 14a.

Finally, the Court of Appeals analyzed the facts and the applicable Supreme Court precedent and concluded that the plaintiff counties also had antitrust and RICO standing under *Illinois Brick* and *Hanover Shoe*. The court found that this case could not be forced into the "cost-plus" exception of *Hanover Shoe* because the contract at issue is not for a "fixed quantity" and, furthermore, because government entities are recognized to suffer injury irrespective of their ability to pass on some or all of the amount of the overcharge. Moreover, the Court of Appeals found that, pursuant to this Court's decision in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the counties were clearly the best parties to be plaintiffs in this case, and only suit by the counties could prevent any action lodged against these defendants from degenerating into the massive evidentiary inquiry that this Court sought to avoid with its pronouncements in *Illinois Brick* and *Hanover Shoe*. The Court of Appeals also held that the same factors established the counties' standing under RICO. After denial of their Petitions for Rehearing, defendants filed the instant Petitions.

## REASONS FOR DENYING THE WRIT

### Summary of Argument

In their Petitions, defendants doggedly pursue the same strategy that they have adopted throughout this litigation; they proclaim their entitlement to a "pass-on" defense, completely ignoring this Court's decisions in *Hanover Shoe* and *Illinois Brick*. Now, however, they have added the predictable contention that there is a "split in the circuits" and a "risk of double recovery" that necessitate this Court's intervention.

The United States Court of Appeals for the Sixth Circuit wisely rejected all such contentions. *Hanover Shoe* and *Illinois Brick* clearly prohibit these defendants from using the pass-on defense to stave off this civil action. Indeed, *Hanover Shoe* and *Illinois Brick* enunciated a clear, firm rule that would prevent exactly the kind of excessive, complex inquiries regarding pass-on questions that have characterized defendants' litigation strategy thus far. The Petitions should be denied because there is no split in the circuits or other need for this Court's intervention and because the decision below was correct.

## I. The Decision Below Correctly Held That *Hanover Shoe* And *Illinois Brick* Accord Antitrust Standing To The Plaintiffs As Direct Purchasers Of Tainted Services.

### A. The Counties Have Standing Pursuant To Article III Of The United States Constitution.

The "threshold question" is whether the plaintiff counties have constitutional standing; the decision below correctly held that the counties met the injury requirements of Article III of the Constitution. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (existence of case or controversy is "the threshold question in every federal case"). Indeed, under *Hanover Shoe* and *Illinois Brick*, there should be no question but that a direct purchaser of tainted services has constitutional standing to sue, quite apart from the issue whether a pass-on defense may be lodged in a particular instance.

To satisfy Article III, a complaint "'must describe some actual or threatened injury to the complainant, must allege a causal connection between that injury and the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress.'" Decision at 11a (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). It has long been recognized that a direct purchaser of tainted goods or services suffers just such "actual injury." *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906). Significantly, the Court added

in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918), that the injury does not vanish merely because the plaintiff is able to recoup the illegal overcharge by passing it on to his own customers. *See also Adams v. Mills* , 286 U.S. 397, 407 (1932).

Moreover, this Court has recently reaffirmed these holdings in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Answering a contention that plaintiff liquor wholesalers lacked constitutional standing to challenge the imposition of a liquor tax, the Court in *Dias* found that the wholesalers "plainly" had standing. *Id.* at 267. First, the wholesalers were liable for the tax, regardless of whether they were in the position to pass it on; second, there was no reason to presume that imposition of the tax did not affect the wholesalers' business. *Id.* at 267. Here, too, the counties were clearly liable for sewage charges under the existing contracts, regardless of whether they could recoup any or all of those charges from municipalities or end users. Consequently, there is no reason to assume that the counties were uninjured by the overcharges. Decision at 15a.

In short, a direct purchaser of tainted services suffers "actual injury" under Article III. The defendants' contrary contention only begs the separate question whether they have a valid pass-on defense in the circumstances of this case.

### B. The Sixth Circuit Correctly Interpreted *Hanover Shoe* And *Illinois Brick* To Permit Only The Narrowest Of "Possible" Exceptions To The Rule Against Pass-On Theories.

Having correctly disposed of the threshold issue of constitutional standing, the Sixth Circuit then addressed the primary issue raised by defendants below: whether the counties are the proper plaintiffs under this Court's rulings in *Hanover Shoe* and *Illinois Brick*. Once again, the Sixth Circuit properly found that *Hanover Shoe* and *Illinois Brick* lay down a firm rule that a direct purchaser has standing to sue under the antitrust laws and permit

only the narrowest of "possible" exceptions, none of which is present in this case.

The holding in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. at 481, was this Court's first, and still-definitive, ruling on the issue whether a direct purchaser of tainted goods who has the power to shift a portion of an alleged overcharge to indirect purchasers retains standing under the antitrust laws. There, Hanover Shoe, the direct lessee of shoe manufacturing machinery services, sued United Shoe, the lessor of the services. United Shoe attempted to defend on the ground that Hanover Shoe suffered no legally cognizable injury because it could pass on any overcharges to its customers, the end users of its shoes.

The Court disallowed the defense in no uncertain terms. As a matter of law, a buyer "has made out a prima facie case of injury and damage within the meaning of [the Clayton Act] . . . when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high. . . ." *Id.* at 489. This conclusion does not change even if the direct purchaser had the opportunity to recoup the overcharges in some other manner:

> It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. . . . We hold that the buyer is equally entitled to damages if he raised the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

*Id.* (citations omitted).

United Shoe argued that the presumption against defensive use of a pass-on theory should be applied on a case-by-case basis and that "sound laws of economics require recognizing the defense" in differing situations. 392 U.S. at 491-92. The Court definitely rejected this argument, questioning the applicability of abstract economic models to real-world litigation problems:

> A wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact. . . . Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

*Id.* at 492-93.

But, even in the rare case in which tracing injury would be feasible, the policies of the antitrust legislation would be undermined by the tracing process: "it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U.S. at 493. Enforcement of the antitrust laws would be unduly complicated by complex threshold inquiries into the issue of "pass-on," and the deterrent effect of the laws would be correspondingly blunted. *Id.*

The Court also identified a substantial policy favoring the designation of the direct purchaser as the injured party irrespective of the fact of a "pass-on": direct purchasers will, in all but the rarest instances, have suffered the greatest injury and thus have the most incentive to sue. "[U]ltimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws . . . would retain the fruits of their illegality . . ." *Id.* at 494. Thus, "[t]reble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness" if the ultimate consumers were deemed the proper plaintiffs. *Id.*

The decision in *Hanover Shoe* acknowledged only the possibility that an antitrust defendant might assert a standing defense to a direct purchaser's suit. The Court recognized that there "might be situations . . . where the considerations requiring that the

passing-on defense not be permitted in this case would not be present." *Id.* It noted as one such possible situation that in which a plaintiff passed on one-hundred percent of the overcharge to the indirect purchaser pursuant to a "pre-existing cost-plus" contract. *Id.* Otherwise, as a matter of antitrust policy, a direct purchaser of tainted goods is sufficiently injured even if he passes on or otherwise recoups the inflated prices he originally pays. *Id.* at 489-94.

In *Illinois Brick Co. v. Illinois* , 431 U.S. 720, 726 (1977), this Court confirmed that the decision in *Hanover Shoe* was not intended to encourage development of *ad hoc* exceptions to the rule against "pass-on" theories. In *Illinois Brick*, state and local government entities attempted to use the pass-on theory offensively (that is, to justify suit by the indirect purchasers of tainted goods). The Court rejected the attempt, confirming, in the process, its ruling in *Hanover Shoe*.

Initially, the Court in *Illinois Brick* rejected what was to be the first of many attempts to limit *Hanover Shoe* to certain types of overcharges. The Court noted that the "principal basis for *Hanover Shoe* . . . was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economist's hypothetical model,'" as well as the "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." 431 U.S. at 732-33. Hence, the Court "reject[ed] . . . attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets" because, even where arguably cost-plus contracts or fixed percentages operate, they are not "adhered to rigidly" in the real world. 431 U.S. at 744.

The Court also noted that *Hanover Shoe* "itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses." 431 U.S. at 745. Even the so-called "pre-existing cost-plus" exception was only cited as a possible situation where an

exception "might be permitted" because the combination of a cost-plus contract with a fixed quantity would arguably eliminate all of the problems that would accompany suits filed by indirect purchasers. 431 U.S. at 736-37, 746. Other than in such rare instances, the Court in *Illinois Brick* saw every reason to "adhere to the narrow scope of exemption indicated by our decision here." 431 U.S. at 745.[11]

Finally, the Court once again noted that it would be undesirable to permit proof of such exceptions. In the process, effective antitrust enforcement would be undermined:

> [T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damages proceedings . . . .

431 U.S. at 744-45.

Hence, the decision below correctly recognized that this Court has ruled as a matter of law against the assertion of the pass-on defense, given the predictable complexities inherent in litigating the issue and the likelihood that permitting such inquiries would deter antitrust enforcement. *See* Decision at 16a-19a. A direct purchaser has been declared the appropriate party to sue under the antitrust laws, and the "possible" exceptions to this rule have been deliberately narrowed in scope so as to discourage lower courts from developing exceptions on an *ad hoc* basis. The court below correctly applied a presumption in favor of the counties' standing that is mandated by *Hanover Shoe* and *Illinois Brick*.

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[11]Hence, petitioners' repeated reliance on their creative "perfect pass-on" theory is misplaced; *Hanover Shoe* and *Illinois Brick* permit no such "perfect pass-on" exception. Petitioners have invented this theory simply because their arguments cannot conceivably fit into one of *Hanover Shoe* and *Illinois Brick's* articulated possible exceptions.

### C. This Case Does Not Fall Within Any Exception, Nor Should An Exception Be Manufactured For Purposes Of This Case.

In light of this Court's controlling decisions, the Sixth Circuit's unwillingness to allow a pass-on defense in this case was completely proper and the district court's contrary view seriously mistaken. The Court of Appeals correctly recognized that, as direct purchasers, the plaintiff counties are the parties with standing to sue and that nothing justifies creating an exception to *Hanover Shoe* for purposes of this case.

It is evident that the counties adequately pled the existence of injury to bring themselves within the rule of *Hanover Shoe*. The counties specifically alleged that they were direct purchasers and that they were injured directly and proximately by defendants' wrongful acts. *See* Complaint at ¶¶ 19-20, 49. Consequently, apart from the supplemental facts eventually tendered in the Fredericks Affidavit, the complaint itself establishes Oakland's presumptive standing pursuant to the governing precedent.

In the face of the Complaint, petitioners have persisted in raising in the district court, and continue to raise, two fundamental contentions: first, that Oakland was not really the "direct purchaser" of sewage services and, second, that Oakland purchased sewage services pursuant to contracts that fall within the "pre-existing cost-plus" or some other exception to *Hanover Shoe*. The Sixth Circuit properly rejected both such arguments.

As a threshold matter, Oakland and Macomb constituted the "direct purchasers" of the sewage services at issue, and it is disingenuous to assert otherwise. By contract, the counties were obligated to purchase the services from Detroit and to pay for those services, even if they obtained no reimbursement for such services from their constituent municipalities or individuals.[12]

[12]As the Sixth Circuit noted in its decision, certain defendants contradicted this argument below by conceding that the counties are the parties obligated to pay Detroit and by attaching as exhibits the contracts demonstrating this very fact. Decision at 10a n.5.

In response, petitioners rely on one sentence—taken out of context—from the Sixth Circuit's decision in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984). In that unrelated case, the Sixth Circuit held that the pendent jurisdiction doctrine permitted the federal court to decide a sewage charge dispute between Oakland County and a municipality; the court at one point described the county as a "mere conduit" and "an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit." *Id.* at 292.

As the Sixth Circuit in the instant case noted, however, the *City of Berkley* opinion made clear that the county was the contracting party and the direct purchaser; indeed, "it was a dispute over the amount of the *County's* charges, after all, that was before us in that case." Decision at 10a-11a (citing *City of Berkley*, 742 F.2d at 291-92) (emphasis original).[13] Thus, nothing in the *City of Berkley* decision obviates the fact that the counties, rather than the municipalities or end users, are the direct purchasers of sewage services from Detroit.

Petitioners' second, principal contention is that the counties lack standing under the "pre-existing cost-plus" exception to *Hanover Shoe* or some other exception that should be recognized for purposes of this case. The Sixth Circuit disagreed, correctly recognizing that the counties are, indeed, injured parties and that nothing in this case permits application of the "cost-plus" exception or the development of a new exception.

First, the contracts at issue clearly do not fall within this Court's definition of the so-called "cost-plus" exception because they are not pre-existing cost-plus contracts for a fixed quantity. In *Illinois Brick*, this Court clarified its earlier reference to the "cost-plus" exception by noting that this exception would make

[13]The court below also noted that the dictum in the *City of Berkley* decision is inaccurate, given the evidence submitted in the present case establishing that the counties pay Detroit from the enterprise funds without regard to whether the municipalities have themselves paid in full or on time. Decision at 10a n.5; *see also* Affid. at ¶ 16(b).

sense only "because [the] customer is committed to buying a fixed quantity regardless of price," making the direct purchaser thus "insulated from any decrease in its sales as a result of attempting to pass on the overcharge . . . ." *Illinois Brick*, 431 U.S. at 736 (discussing *Hanover Shoe*, 392 U.S. at 481). Since then, most lower courts have adhered to the rule that the "cost-plus" exception may only be invoked where the contract at issue is a "pre-existing cost-plus" contract for a fixed quantity. *See, e.g., In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir.), *petition for cert. filed sub nom. Kansas v. The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

In the present case, the contracts and injuries at issue are not "fixed quantity" contracts. The counties do *not* commit to purchase or sell a certain amount of sewage services, and the demand remains elastic. By arguing that the "cost-plus" exception is flexible and should be interpreted not to require a "fixed quantity," petitioners themselves tacitly concede that the instant contracts do not fall within the literal and deliberately narrow scope of the "cost-plus" exception. Allevato Petition at 17-21.

Hedging their bets, petitioners also assert that the counties passed through all of their injury in an easily traceable fashion, hence requiring the development of a new exception to fit the facts of this case. Specifically, petitioners argue that the counties are by law "not-for-profit" entities so far as their sewage collection procedures are concerned; consequently, the manner in which they pass through their overcharges must be presumed to effect a "*perfect* pass-on" of all injuries that the counties suffer due to overcharges. Allevato Petition at 6, 9-12, 13 (emphasis original). The error here lies in equating "overcharges" with "injury." Although the counties operate as "not-for-profit" entities, they nevertheless suffer injury when forced to pay significant overcharges.

*Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), concerned the applicability of the *Hanover Shoe* rule to a governmental entity that was directly injured by a RICO violation.[14] In the *Carter* case, Cook County taxpayers sued an individual who allegedly bribed the County Board of Tax Appeals to obtain lower property tax assessments for his own clients; the taxpayers alleged that they were injured, albeit indirectly, because they were forced to pay higher taxes as a result of the lower assessments paid by the defendant's clients.

The Court of Appeals held that only the county—the directly injured party—had standing to sue. In so holding, the court rejected the argument that a wronged government entity will necessarily recoup all of its injury, thereby losing the right to sue under the antitrust laws or RICO:

> Governmental units of Cook County do not necessarily raise innocent people's taxes by $1 to offset every loss of $1 to fraud. The government is concerned about the overall rate of tax; higher taxes may induce people and business to move away and may depress economic activity. Thus the County, like the purchasers from a monopolist, may try to find substitutes that limit the amount of passing on. Governmental units may tighten the purse strings rather than raise taxes, or they may find other sources of revenue.

*Id.* at 1177.

Likewise, the court in the instant case criticized the district court for simply presuming that "supply and demand do not interact" in a not-for-profit situation and that the counties could not have been injured by the overcharges alleged:

> The Counties may not have been in competition with others for the sale of sewer services, but surely these counties were in competition with other counties in attempting to attract and retain people and/or industry and commerce. We are

[14]While *Carter* was a RICO action, the court found that the considerations governing RICO standing are identical to those governing antitrust standing; hence, the Court analyzed *Illinois Brick* and *Hanover Shoe* to reach its conclusion. 777 F.2d at 1175-1178.

> not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live.

Decision at 15a (citing *Carter*, 777 F.2d at 1177). In other words, here as in *Carter*, the defendants' imposition of illegal overcharges injured the counties' ability to attract residents and businesses—and, hence, to augment their tax base.

Indeed, in this case the uncontroverted Affidavit of Oakland County's Chief Deputy Drain Commissioner establishes that the injury to Oakland went beyond even that identified in *Carter*, because of the manner in which this particular county funds and administers its sewage disposal system. The Affidavit explains that Oakland pays for its sewage interceptors and improvements by issuing bonds in its own name, pledging its full faith and credit for those bonds. Affid. at ¶¶ 9-10. Thus, if Oakland's overall revenue from sewage is reduced because individuals and businesses refuse to locate in Oakland or choose to leave Oakland in reaction to the overcharges, the county risks defaulting on its bonds and injuring both its credit rating and its long-term ability to fund public improvements. Plaintiffs' injury in the present case is thus more than assumption—it is uncontroverted fact. And, like the injury noted in *Carter*, it is an injury that will be suffered by the county regardless of whether it is eventually able to recoup the overcharges.

Petitioners also rely on a purported distinction between "horizontal" and "vertical" tracing of injuries and contend that *Hanover Shoe* only applies where the tracing difficulty is vertical, as between direct and indirect purchasers on the chain of distribution. Nothing in *Hanover Shoe*, however, supports this artificial distinction, nor are petitioners' factual assumptions correct.

The evidence tendered below establishes that there would indeed be a tremendous tracing problem if the indirect purchasers were deemed the proper parties to sue. The manner of distribu-

tion of sewage charges among indirect purchasers (municipalities or individuals) varies widely from sewer district to sewer district, and even within certain districts. That every municipality within the individual districts uses a different method to assess its end users for the sewage charges further heightens the complexity.

In short, determining exactly how much of an overcharge was passed on to a particular indirect purchaser would necessitate an intricate and highly complicated inquiry. It was the spectre of just such evidentiary complexity that underlay the *Hanover Shoe* decision to preclude suit by indirect purchasers, except perhaps in the rarest of cases in which all proof problems are absent. Clearly, this is not such a case.

Finally, petitioners fall back on the pragmatic rules of standing enunciated in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983). As the Court of Appeals recognized, however, examining this case according to the facts set forth in the *Associated General Contractors* decision overwhelmingly supports the counties' right to sue and weighs "heavily in favor of concentrating the full amount of any recovery in the counties . . . ." Decision at 23a.

Among the factors noted in *Associated General Contractors* is the " 'nature of the plaintiff's alleged injury,' " which in the present case is "a classic example of precisely the sort of injury with which the antitrust laws were intended to deal"—overcharges caused by anticompetitive practices. Decision at 23a (quoting *Associated General Contractors*, 459 U.S. at 537). Also relevant is the directness of the injury, which in this case is obvious. *Id.* at 24a. Perhaps most important, however, is the " 'strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits.' " *Id.* at 25a (quoting *Associated General Contractors*, 459 U.S. at 543). In the present case, the Court of Appeals noted that "[a] straightforward action by . . . [the] counties alone would obviously be more manageable than a class action brought on behalf of thousands of remote consumers

whose individual claims would present extraordinary complexities." *Id.* Certainly "[t]he task of making a proper allocation and distribution of any recovery to thousands of end users would be a formidable one, particularly in view of the frequency with which modern Americans change their place of residence." *Id.*[15]

In short, the Court of Appeals properly applied the governing Supreme Court precedent to the facts of the instant case in concluding that the counties have standing to sue. This action falls within no recognized exception to the pass-on rule. Pragmatic considerations support the conclusion that the counties are the most effective plaintiffs to enforce the antitrust laws in this case. The Sixth Circuit's decision should stand.

## II. For The Same Reasons, The Counties Also Have Standing Under RICO.

Likewise, the Court of Appeals correctly concluded that the facts supporting the counties' antitrust standing also render them "proper parties to sue for damages allegedly arising out of RICO violations." *Id.* In so ruling, the court relied on two cases from other circuits that squarely confronted and rejected the pass-on defense in the context of RICO actions, *Carter v. Berger*, 777 F.2d at 1173, and *Terre Du Lac Ass'n v Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).[16]

[15]The Court of Appeals also noted that the end users would indirectly benefit if the counties recovered in this litigation, because the counties' "non-profit" legal status would require that any recovery be passed through to the end users. Decision at 23a n.6. Thus, there is no prospect that the direct purchaser would somehow receive an unfair "windfall." In similar circumstances, courts have found that the direct purchaser should have standing. *See Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203 (7th Cir. 1964); *Public Utility District No. 1 v. General Electric Co.*, 230 F. Supp. 744 (W.D. Wash. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F. Supp. 59 (S.D.N.Y.), *appeal denied*, 337 F.2d 844 (2d Cir. 1964).

[16]The Sixth Circuit did not rely on antitrust precedent to support its finding that the counties had standing under RICO. Rather, the court considered the counties' factual allegations and RICO case law. As a result, petitioners' attempt to contrast the goals underlying the antitrust and RICO statutes to illustrate that the counties lack RICO standing is irrelevant.

In *Carter*, the Seventh Circuit held that a county, rather than its taxpayers, was the proper RICO plaintiff where defendant's actions—bribing county officials to secure lower tax assessments for the property of defendant's clients—directly injured the county. The court specifically stated that the county's RICO standing was not impaired by the possibility that it had passed on the effect of its injury to its taxpayers; "the fact that the County may have recouped the loss by raising the rate of tax does not defeat its recovery." 777 F.2d at 1176. Similarly, the Eighth Circuit in *Terre Du Lac* recognized the RICO standing of a property owners' association, rejecting defendants' argument that the association was not a proper plaintiff because it could pass its injury on to its members. 772 F.2d at 473. In short, *Carter* and *Terre Du Lac* both rejected the pass-on defense in the RICO context, without any exceptions.[17]

Simply put, a plaintiff has a viable RICO cause of action "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). Here, the counties have sufficiently pled a pattern of racketeering on the part of the petitioners—indeed, they rely on essentially the same pattern utilized in the federal indictments to secure the convictions or guilty pleas of many of the petitioners. Moreover, the counties have sufficiently alleged that petitioners' acts directly resulted in the counties' payment of illegally inflated prices for sewage service. The counties have thus met the threshold requirements of RICO standing.

## III. These Petitions Do Not Raise Any Questions Requiring This Court's Intervention.

Not only is the decision below clearly correct, but the Petitions fail to demonstrate any ancillary reasons why this case requires

[17]This is consistent with Congressional intent to generate RICO standing requirements that were, if anything, even less stringent than those applicable to antitrust plaintiffs. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498-99 (1985); *Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988).

this Court's intervention. There is no split in the circuits on the relevant issue and no threat of double recovery; nor is there any other policy ground that favors the granting of these Petitions.

### A. There is No Split In The Circuits.

Petitioners contend that the Sixth Circuit's decision in this case creates a serious "split in the circuits" that requires this Court to grant certiorari in the present case. This is incorrect. The decision of the United States Court of Appeals for the Seventh Circuit in *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.), *cert. denied*, __ U.S. __, 109 S. Ct. 543 (1988), is distinguishable and, in any event, is arguably in conflict with the Seventh Circuit's decision in *Carter*, as well as this Court's governing decisions.

In *Panhandle Eastern*, the United States Court of Appeals for the Seventh Circuit held that the State of Illinois could maintain an antitrust suit against a regulated utility on behalf of residential consumers of gas under the "cost-plus" exception to *Hanover Shoe*, thus permitting suit by the end users rather than the direct purchaser. The Court's decision was explicitly grounded on the unique facts of the case; perhaps more significantly, the utility/direct purchaser in that case (CILCO) had delayed in filing suit, thus raising a serious question whether the statute of limitations had expired. The court held that, as a result, the end users rather than CILCO would most effectively enforce the antitrust laws. In the process, the Seventh Circuit found that regulated industry contracts that include formal cost-plus pricing should come within the "cost-plus" exception to *Hanover Shoe*.

The facts in *Panhandle Eastern* are readily distinguishable from those of the present case. Here, the direct purchasers are governmental entities that, as in *Carter*, may well be able to pass on certain overcharges but almost certainly cannot pass on the injuries caused to their enterprise funds, bond credit, or general ability to attract residents and businesses into their jurisdictions.

Here, too, the counties have every incentive to sue and pursue the action as vigorously as possible; the most effective enforcement of the law against these already-convicted defendants indisputably lies in litigation by the parties who suffered the entire initial antitrust injury. Finally, this case presents the substantial tracing and proof problems that were completely absent in *Panhandle Eastern*. Just attempting to unravel the various billing mechanisms used by Oakland's three sewer districts to charge for sewage services, and then tracking how the individual end users were billed, would place any court squarely within the evidentiary complexities and massive threshold litigation that this Court sought to avoid by means of *Hanover Shoe* and *Illinois Brick*. In short, the substantial factual differences between *Panhandle Eastern* and this case negate the argument that there is a "serious" conflict in the circuits requiring this Court to assume jurisdiction.

Moreover, the precedential value of *Panhandle Eastern* is questionable given the Seventh Circuit's earlier opinion in *Carter v. Berger*, a case that took a different approach to the issue of pass-on and the existence of antitrust injury in a factual situation more similar to the one at hand. In *Carter*, the Seventh Circuit held that a not-for-profit governmental entity suffers injury sufficient to defeat a pass-on defense even if it passes on all of the overcharges. Although *Panhandle Eastern* arguably departed from *Carter*, *Panhandle Eastern* did not purport to overrule or limit *Carter* in any way, perhaps due to the vast factual differences between the two cases. Hence, *Carter* is the Seventh Circuit precedent analogous to the present case, and it fully supports the Sixth Circuit's decision.

Finally, even if a conflict is presumed between the *Panhandle Eastern* court's apparent willingness to manufacture new exceptions and the Sixth Circuit's refusal to do so, it is clear that the present decision represents the correct approach under *Illinois Brick* and *Hanover Shoe*. Recently, the United States Court of Appeals for the Tenth Circuit rejected an attempt to carve out an

exception for regulated industries similar to the one manufactured by the Seventh Circuit in *Panhandle*. *See In Re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir.), *petition for cert. filed sub nom. Kansas v. The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989). The Tenth Circuit first noted that *Illinois Brick* laid down a firm rule that the proper antitrust plaintiff is the direct purchaser from an antiturst violator. In light of the clarity of the *Illinois Brick* holding, the courts of appeal are not free to "broadly construe the exceptions." *Id.* at 1291.

The Tenth Circuit went on to reject the *Panhandle Eastern* conclusion that the "cost-plus" exception could apply even if the contract did not have both "cost-plus" and "fixed quantity" components. Without the fixed quantity component, the problem of apportionment of damages would still exist even if all of the overcharge were passed on "because there still exists the issue of decreased residential demand caused by the higher price." *Id.* at 1292. In the Tenth Circuit's view, even the purportedly unique facts in *Panhandle Eastern* could not justify broadening the narrow exceptions noted in *Illinois Brick* and *Hanover Shoe*. *Id.*

So holding, the Tenth Circuit stated that "the controlling cases are *Hanover Shoe* and *Illinois Brick*, and not *Panhandle Eastern*." *Id.* at 1293. Indeed, "[i]f we were to adopt the reasoning of *Panhandle Eastern*, we would in reality be carving out yet another exception (regulation of public utilities) to the basic rule that only a direct purchaser may sue for the antitrust violation, and this we are unwilling to do." *Id.* The Sixth Circuit's decision below likewise reflects the view that *Illinois Brick* and *Hanover Shoe* lay down a firm rule with numerous policy justifications, and that courts of appeal are not free to create new exceptions merely because they believe one or another of those policy justifications may not operate in an individual case.

In sum, *Panhandle Eastern* is inapposite for several reasons. First, it is readily distinguishable on its facts. Second, it is not the

Seventh Circuit precedent applicable to the present fact situation. Finally, to the extent there is any arguable deviation from this Court's decisions, it is in *Panhandle Eastern*, not in the present case. This Court should therefore leave it to the Seventh Circuit to resolve any troublesome dicta in *Panhandle Eastern.*

### B. This Decision Will Have Relatively Little Impact On The Majority Of Antitrust or RICO Cases.

Finally, this Court should decline to grant certiorari because the present case, while vitally important to its parties, will have little impact on the majority of antitrust or RICO actions. Certainly it poses none of the dangers predicted by petitioners.

First, there is no frequently invoked antitrust or RICO principle at issue in the present case. Rather, it presents the relatively rare question of a governmental entity's standing under *Hanover Shoe*, a matter that appears only to have arisen in a small number of cases, and the decision below provided a logically unassailable analysis of the relevant issues.

Moreover, petitioners' arguments regarding the threat of "double recoveries" are difficult to comprehend. The Allevato Petition asserts that defendants are entitled to a pass-on defense because there is a class action pending against defendants brought by the end users of sewage services in Oakland and Macomb. Allevato Petition at 23. This statement distorts the facts. Only after the district court dismissed the instant case for lack of standing did the end users file the class action, hoping to meet the statute of limitations and preserve *someone's* right to sue these defendants in the event that the district court's decision was upheld. It is axiomatic that, under *Illinois Brick*, the class action cannot proceed if the Sixth Circuit's ruling is upheld.

Petitioners present an equally obscure variation of the "double recovery" argument by asserting that the pass-on defense must be

allowed here because the Court's recent ruling in *California v. ARC America Corp.*, __ U.S. __, 109 S.Ct. 1661 (1989), permits indirect purchasers to sue under state law. Young Petition at 12-15. This is unpersuasive; this Court in *ARC* distinguished its rulings in *Illinois Brick* and *Hanover Shoe* from the separate preemption question involved in *ARC* and took care to negate the notion that *ARC* expanded the scope of the *Hanover Shoe* exceptions.[18] Likewise, the fact that *ARC* expands the states' powers to enforce antitrust laws in no way poses a unique threat to these defendants; every antitrust defendant faces the same risks. Nothing in *ARC* justifies carving out a new exception for these petitioners.

Finally, Petitioner Young goes so far as to suggest that this case presents an excellent chance to reverse or limit the Court's holdings in *Hanover Shoe* and *Illinois Brick*, but does not say why this Court should do so. Young Petition at 15. In fact, the evidence clearly demonstrates that the best chance for the citizens of Oakland and Macomb counties to vindicate their rights against defendants rests in the complaints that are the subject of these Petitions. Nothing in the present case warrants tampering with the reasoning of *Hanover Shoe* and *Illinois Brick*.

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[18]To so argue, petitioners seriously misstate the language of *ARC*. They contend that the *ARC* decision "reaffirmed the continued viability of the cost-plus exception to the rule in *Illinois Brick* and *Hanover Shoe*." Allevato Petition at 14 n.17. Rather, this Court in *ARC* plainly stated that the *Illinois Brick* Court had "noted two possible exceptions," again taking pains to advert to the exceptions as "possible." *ARC*, __ U.S. __, 109 S.Ct. at 1663 n.2.

## CONCLUSION

For the reasons set forth above, this Court should deny the Petitions for Writ of Certiorari.

Respectfully submitted,

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## APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

THE COUNTY OF OAKLAND, by GEORGE W. KUHN, the Oakland County Drain Commissioner,

*Plaintiff,*

*vs.*

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL, INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,

*Defendants.*

Civil Action No. 84-CV1068-DT

### COMPLAINT

Plaintiff, the County of Oakland, by George W. Kuhn, the Oakland County Drain Commissioner, complains of Defendants as follows:

### PRELIMINARY STATEMENT

1. This civil action is brought to recover damages stemming from illegal activities prohibited by the Sherman Act (15 U.S.C. § 1 et seq.) and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.). This is also an action for breach of fiduciary duty in violation of 28 U.S.C. § 959.

## JURISDICTION AND VENUE

2. The jurisdiction of this Court over Counts I and II is premised upon 15 U.S.C. §§ 4 and 15 (federal antitrust) and over Counts III through VII upon 18 U.S.C. §§ 1964(a) and (c) (Racketeer Influenced and Corrupt Organizations). Federal jurisdiction is also based on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (commerce) and with regard to Count VIII is based on 28 U.S.C. § 959 (trustees and receivers).

3. Venue is proper in this district under 15 U.S.C. § 22, 18 U.S.C. § 1965 and 28 U.S.C. §§ 1391(b) and (c). All Defendants transact business and can be found within this district, and the acts alleged herein took place within this district.

## PARTIES

4. Plaintiff, the County of Oakland ("Oakland County") is a public corporation organized and existing under the Michigan Constitution and the laws of the State of Michigan; the Oakland County Drain Commissioner is the designated agency of Oakland County through which it operates and maintains a sewage system for collecting and transporting sanitary and industrial wastes and storm water generated within its jurisdiction.

5. Defendant City of Detroit ("Detroit") is a municipal corporation organized and existing under the laws of the State of Michigan. The Detroit Water and Sewerage Department ("DWSD"), is the Detroit agency that operates and maintains a sewage system for collecting, transporting, treating and disposing of the sanitary and industrial wastes and storm water generated within Detroit and within certain surrounding communities including Oakland County. DWSD operates and maintains the Detroit Waste Water Treatment Plant (the "DWWTP") for the purpose of treating the sanitary and industrial wastes and storm water collected by DWSD; the DWWTP discharges its treated effluent into navigable waters of the United States.

6. Defendant, Coleman A. Young ("Young") is an individual residing at Manoogian Mansion, 9240 Dwight, Detroit, Michigan. Young is and at all relevant times was the Mayor of Detroit. In that capacity, Young was appointed Administrator of the DWWTP on March 21, 1979, pursuant to an order of the Honorable John Feikens, Chief Judge of the United States District Court for the Eastern District of Michigan, in the case of *United States of America* v. *City of Detroit et al.*, No. 7-71100.

7. Defendant Charles Beckham ("Beckham") is an individual residing at 14220 Stahelin, Detroit, Michigan, and at all relevant times was the Director of DWSD.

8. Defendant Nancy Allevato is the Personal Representative of the Estate of Michael Ferrantino ("Ferrantino"). Ferrantino was an individual who resided at 331 Hampshire Ct., Dearborn, Michigan. At all relevant times Ferrantino was a shareholder and president of Defendants Michigan Disposal, Inc. and Wayne Disposal Inc. He also held an interest in Defendant Wolverine Disposal, Inc. Ferrantino was found guilty of participating in a conspiracy to bribe a public official in violation of 18 USC § 1962(d) on December 9, 1983. Nancy Allevato is sued in her representative capacity for the actions of Ferrantino taken prior to his death.

9. Defendant Darralyn Bowers ("Bowers") is an individual residing at 1851 Wellsley Drive, Detroit, Michigan, and at all relevant times held an interest in Defendant Vista Disposal, Inc. Bowers was found guilty of participating in a conspiracy to bribe a public official in violation of 18 U.S.C. § 1962(d) on December 9, 1983.

10. Defendant Sam Cusenza ("Cusenza") is an individual residing at 50880 Murray Hill Drive, Plymouth, Michigan. Cusenza was at all relevant times nominally a 50% shareholder in, and a Vice President of, Defendants Wolverine Disposal, Inc.

and Wolverine Disposal-Detroit, Inc. Cusenza was found guilty of participating in a conspiracy to bribe a public official in violation of 18 U.S.C. § 1962(d) on December 9, 1983 and pled guilty to racketeering activity in violation of 18 U.S.C. § 1962(c) on January 19, 1984.

11. Defendant Joseph Valentini ("Valentini") is an individual residing at 8583 Winston Lane, Dearborn Heights, Michigan. Valentini was at all relevant times nominally a 50% shareholder in and President of Defendants Wolverine Disposal, Inc. and Wolverine Disposal-Detroit, Inc. Valentini pled guilty to participating in a conspiracy to bribe a public official in violation of 28 U.S.C. § 1962(d) on January 19, 1984.

12. Defendant Charles Carson ("Carson") is an individual residing at 1400 Yorktown, Grosse Pointe Woods, Michigan, and at all relevant times was the attorney for Vista Disposal, Inc.

13. Defendant Walter Tomyn ("Tomyn") is an individual residing at 6950 Killarney, Troy, Michigan. Tomyn was at all relevant times an officer and employee of Michigan Disposal, Inc. and was an engineering consultant to Vista Disposal, Inc.

14. Defendant Vista Disposal, Inc. ("Vista"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 313 Michigan Avenue, Detroit, Michigan.

15. Defendant Michigan Disposal, Inc. ("Michigan Disposal"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 1060 Rawsonville Road, Ypsilanti, Michigan. Michigan Disposal at all relevant times was in the business of hauling, processing and disposing of wastewater sludge.

16. Defendant Wayne Disposal, Inc. ("Wayne Disposal"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 49350 North

Service Drive, Van Buren Township, Michigan, and whose registered office is at 331 Hampshire Court, Dearborn, Michigan. Wayne Disposal at all relevant times was in the business of operating a landfill for the processing and disposal of waste, including wastewater sludge.

17. Defendant Wolverine Disposal, Inc. ("Wolverine"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 1060 Rawsonville Road, Ypsilanti, Michigan. Wolverine Disposal at all relevant times was in the business of hauling, processing and disposing of wastewater sludge.

18. Defendant Wolverine Disposal-Detroit, Inc. ("Wolverine-Detroit"), is a corporation organized and operating under the laws of the State of Michigan, which maintained its principal place of business within this District, and whose registered office was at 1060 Rawsonville Road, Ypsilanti, Michigan, until on or about October 28, 1980, and thereafter at 313 Michigan Avenue, Detroit, Michigan. Wolverine-Detroit at all relevant times was in the business of hauling, processing and disposing of wastewater sludge.

## FACTS

19. Oakland County operates and maintains three sewage disposal districts known as the Evergreen-Farmington District, the Southeastern Oakland County Sewage Disposal District and the Clinton-Oakland Sewage Disposal System. Oakland County has entered into three separate contracts with Detroit and DWSD for the transportation, treatment and disposal of sewage from each of the three districts. The treatment and disposal is performed by DWWTP.

20. Detroit charges Oakland County according to the costs incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from municipalities within each district and pays Detroit. Detroit has always

passed through to Oakland County a portion of all costs incurred in the treating and disposal of wastes at DWWTP, including the costs for sludge and scum hauling disposal. Sludge and scum are two of the end products of treating sewage.

21. On May 6, 1977, the United States brought a civil action (No. 7-71100) in the United States District Court for the Eastern District of Michigan (the "District Court") against Detroit and the DWSD for discharging pollutants from the DWWTP into navigable waters of the United States in violation of federal laws and regulations. Detroit and DWSD entered into a Consent Judgment effective September 9, 1977, in which they agreed among other things to upgrade the DWWTP in order to bring its discharges into compliance with applicable laws and regulations.

22. On October 18, 1978, the District Court issued an Order to Show Cause why Detroit and DWSD were not moving more quickly toward compliance with the Consent Judgment. After holding hearings pursuant to the Order To Show Cause, the District Court issued an Order on March 21, 1979, appointing Young as Administrator of the DWWTP. The Order provided in part that the appointment was "for the purpose of carrying out the obligations of Detroit under the Consent Judgment" but "would not have the effect of relieving Detroit of its obligations under the Consent Judgment".

23. Prior to 1979, limited amounts of sludge were removed from the sewage treated by DWWTP and that sludge was either incinerated or discharged into the Detroit River. As a result of the Consent Judgment, after 1979, DWWTP was required to remove increased amounts of sludge, and those amounts which could not be incinerated were required to be disposed of by means which complied with applicable environmental regulations.

24. On May 1, 1979, Detroit entered into a contract known as PC 439 with Michigan Disposal for hauling and disposal by landfill (an operation hereafter described as "disposal") of the sludge

that was not incinerated. This contract was effective from July 1, 1979 through June 30, 1983. On October 15, 1980, it was amended to include the disposal of scum from DWWTP, and in 1982 it was amended again to run through June 30, 1985. Both Michigan Disposal and Wayne Disposal were then owned by Ferrantino. Tomyn was at all times an employee of Michigan Disposal. Ferrantino and Tomyn caused Michigan Disposal to haul the sludge and scum to Wayne Disposal's landfill. A significant portion of the funds paid by Detroit to Michigan Disposal, a portion of which Detroit had received from Oakland County, were paid by Michigan Disposal to Wayne Disposal.

25. One other company, Nytrex, obtained a contract from Detroit for sludge disposal during 1979. Nytrex, reportedly, was unable to find a suitable landfill for the sludge. As a result, Michigan Disposal was, in fact, the sole sludge disposal contractor for Detroit during 1979.

26. Toward the end of 1979, DWSD realized that DWWTP needed to dispose of increasing quantities of sludge. Ferrantino, Tomyn and Michigan Disposal, aware of these circumstances, submitted an unsolicited proposal to DWSD to increase the minimum volume of sludge disposal guaranteed to Michigan Disposal. Michigan Disposal also proposed, on or about March 19, 1980, to construct a holding pad at the DWWTP that would permit stabilization, accumulation and storage of the sludge for at least 12 hours prior to disposal. Engineering plans for the pad were prepared by Tomyn. DWSD rejected the unsolicited proposal of Michigan Disposal based on its conclusion that operating with only a single contractor for sludge disposal was a serious disadvantage to Detroit.

27. After the unsolicited Michigan Disposal proposal was rejected by the DWSD, Ferrantino took steps to (a) circumvent the decision of the DWSD, (b) perpetuate the monopoly of Michigan Disposal, Wayne Disposal and Ferrantino, (c) exclude competition in the disposal of sludge from DWWTP, and (d) fix the price

for those services. The steps included establishing a front company that would hide the interests of Ferrantino, Michigan Disposal and other conspirators and securing a second sludge disposal contract from the City for the front company at prices identical to those charged by Michigan Disposal.

28. Ferrantino obtained the agreement of Bowers to advance the scheme described in paragraph 27 hereof. From at least 1979 Bowers was a friend and confidant of Young and Beckham.

29. In or about the end of 1979 Ferrantino and Bowers conspired to (a) form the front company that would secure the second sludge disposal contract, (b) use Bower's influence with Young and Beckham to procure that contract, and (c) hide their interests, those of Michigan Disposal and others from the public. In furtherance of this conspiracy Bowers sought the participation of Jerry Owens ("Owens"), to head the front company. Owens had no prior connection with either Detroit, Ferrantino or sludge hauling.

30. At meetings in February and March, 1980, Bowers introduced Owens to Ferrantino, Tomyn, Cusenza and Valentini. Cusenza and Valentini were former employees of Michigan Disposal who had established a separate hauling company, Wolverine. Ferrantino held an interest in Wolverine.

31. Ferrantino, Bowers, Tomyn, Cusenza, Valentini and Owens, agreed (a) that they would form a "front" company to be known as Vista Disposal, Inc., (b) that Owens would falsely hold himself out as its sole owner, and (c) that the company would be used to secure a sludge disposal contract from Detroit. They also agreed that Tomyn would provide Vista with all necessary engineering services, Cusenza and Valentini would provide Vista with all necessary financing and equipment through Wolverine and Wolverine-Detroit, Ferrantino would provide Vista with a licensed and permitted landfill (Wayne Disposal's landfill) and Bowers would use her influence with Young and Beckham to obtain the contract for Vista.

32. On March 28, 1980, before Vista was formally incorporated, Owens and Bowers caused an unsolicited letter to be sent to Detroit in the name of Vista expressing interest in bidding on a sludge disposal contract. Vista proposed to charge Detroit the same prices as Detroit was then being charged by Michigan Disposal.

33. In or about April 1980, Owens met with Beckham to discuss the Vista proposal. Thereafter, on May 9, 1980 Vista submitted, directly to Beckham, further details of its hauling and disposal proposal, many of which had been prepared by Tomyn. The May 9th proposal included construction at the DWWTP of a sludge holding pad that would permit stabilization of the sludge before hauling and would permit the storage of sludge for at least 12 hours. The proposal also contained a false statement of Vista's ownership by Owens and a false resume of Owens' education and experience, and otherwise failed to disclose material information concerning ownership, legal and equitable interests in, financial condition, and corporate history of Vista and its ability to independently perform the tasks it was proposing to perform.

34. Between May 9, 1980 and June 30, 1980 Bowers spoke with Young and Beckham for the purpose of obtaining their influence to speed consideration of and grant Vista's proposal. Young and Beckham each agreed with Bowers to grant the proposal. At the time each did so they knew, or should have known, that Vista was being used to hide the interests of Bowers and others and was unable to independently perform the tasks it was proposing.

35. In 1980, Detroit and its agents and agencies, including the DWSD, were required to contract for supplies, materials and services through one of two procurement processes, (a) competitive bid, or (b) requests for proposals (RFP). When contracts were to be awarded by competitive bid, Detroit was required to award the contract to the lowest qualified bidder. When contracts were to be awarded following issuance of an RFP, the contract award would be based on a combination of factors which included consideration of both the contractor's qualifications to provide

the needed supplies and/or services and price. On occasion, issuance of an RFP would be preceded by a Request for Qualifications (RFQ). An RFQ was designed to invite prospective contractors to submit their qualifications for solving particular problems. Based on a review of responses to an RFQ, Detroit's department or agency involved would issue an RFP to these firms or entities whose RFQ response indicated a capability to provide the needed service to resolve the pending problem.

36. On or about June 30, 1980, Beckham announced to David Fisher, an employee of the DWSD that he wanted the Vista proposal implemented. Fisher advised Beckham that Detroit was obligated to permit the public to bid on such contracts and recommended that Detroit prepare and publish a request for proposals (RFP) from qualified bidders. Beckham rejected that procedure and instead on or about July 15, 1980, elected to publish only an RFQ for potential contractors. The RFQ ostensibly sought to identify contractors capable of constructing a sludge mixing pad on site at the DWWTP and perform hauling of sludge to augment services then being provided by Michigan Disposal pursuant to PC 439. The RFQ sought information concerning the qualifications of prospective contractors in five (5) areas including (a) whether the contractor had access to a landfill site for dumping sludge, (b) whether the contractor had performed successfully in the field of sludge disposal in the past, (c) whether the contractor had adequate resources available to perform the contemplated task; (d) a disclosure of corporate identity, and (e) a statement from a bonding company concerning bondability of a minimum of $250,000.

37. Vista responded to the request for qualifications on July 21, 1980. The response was similar to its proposal of May 9, 1980, contained the same false statements and omissions, and misrepresented that it could comply with the specifications of the RFQ set forth in paragraph 36.

38. On or about August 8, 1980, the DWSD, through Beckham, notified Vista by mail that it had been selected from among those who responded to the RFQ to submit a formal contract for the hauling and disposal of sludge from DWWTP.

39. Carson, an attorney, was hired by Vista, at the suggestion of Ferrantino, to prepare the contract and negotiate its terms with Detroit. Carson was, at all relevant times, aware that Vista was not owned entirely by Owens and that the interests of Ferrantino, Bowers, Cusenza, Valentini, Michigan Disposal, Wolverine and Wolverine-Detroit had been and were to be concealed. Carson participated in the concealment of the interests of Ferrantino, Bowers, Cusenza, Valentini, Michigan Disposal, Wolverine and Wolverine-Detroit in Vista and facilitated the purpose of the concealment by (a) assisting Vista to avoid the financial investigation that would have been otherwise required had Detroit insisted on a performance bond, (b) aiding Owens in the submission of false information concerning Owens and Vista to the Human Rights Department of Detroit, and (c) negotiating with Detroit to eliminate a proposed contract provision which would have prohibited Vista from assigning proceeds from the contract to the persons and entities holding concealed interests in the company.

40. The contract with Vista, known as PC 483, was submitted by Beckham to the City Council of Detroit (the "Council") for approval in October, 1980. Information provided to Council staff by Beckham and which was available to the Council misrepresented Owens as the sole owner of Vista and failed to disclose Owens' background and work experience. The Council deferred consideration of the proposed contract until Beckham and DWSD had an opportunity to answer certain questions propounded by the Council.

41. Beckham and DWSD did not answer the Council's questions. Instead, Young, with the assistance of Beckham, bypassed the Council. On October 20, 1980, Young approved PC 483 purportedly acting under his authority as Administrator of the

DWWTP, all with the effect and purpose of avoiding public scrutiny of PC 483.

42. Thereafter, Bowers, with the knowledge and assistance of Ferrantino, Cusenza, Valentini, Michigan Disposal, Wayne Disposal, Wolverine, Wolverine-Detroit and Vista, paid monies to Beckham for his aid and influence in the award of PC 483 to Vista and to corrupt his judgment in the subsequent administration of PC 483 and PC 439. Bowers made $2,000.00 payments to Beckham on November 1, 1980, December 1, 1980, January 6, 1981, January 27, 1981, June 2, 1981, August 5, 1981 and September 4, 1981, and $4,000.00 on May 5, 1981. She also arranged for Beckham to receive other things of value.

43. During the latter part of October, 1980, Vista entered into a joint venture with Wolverine-Detroit (the joint venture is hereafter referred to as "Vista/Wolverine") for the purpose of performing PC 483. Vista was paid for construction of the sludge holding pad and for disposal of sludge from the DWWTP. The prices charged by Vista and paid by Detroit for disposal of sludge were the same prices charged by Michigan Disposal under PC 439.

44. Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Owens, Young, Beckham, Michigan Disposal, Wayne Disposal, Wolverine, Wolverine-Detroit and Vista combined and conspired to do one or more of the following:

(a) Exclude competition for PC 483 and secure that contract for Vista;

(b) Fix the price for disposal of DWWTP sludge;

(c) Obtain a monopoly over the disposal of DWWTP sludge; and

(d) Obtain approval of a price increase for PC 439 and PC 483 after those contracts had been executed.

45. Young and Beckham each performed the acts alleged above in their official capacities as agents and officers of Detroit.

46. The request for proposals for PC 483, the letting of PC 483, the construction of the sludge holding pad, and the hauling and disposal of DWWTP sludge are activities conducted in and which substantially affect interstate commerce.

## COUNT I

## SHERMAN ACT, RESTRAINT OF TRADE

47. Plaintiff realleges paragraphs 1 through 46.

48. Beginning in 1979 and continuing through at least 1983, the Defendants entered into and engaged in a combination or conspiracy in restraint of trade in violation of 15 U.S.C. § 1 by one or both of the following acts:

(a) Fixing the price for disposal of DWWTP sludge;

(b) Excluding competition for disposal of DWWTP sludge with the effect of fixing the price for that service.

49. Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by Defendants' unlawful conduct.

WHEREFORE, Plaintiff prays for entry of judgment against all Defendants, jointly and severally:

I. Permanently enjoining the conduct alleged above;

II. Awarding Plaintiff its damages trebled as provided by 15 U.S.C. § 15;

III. Awarding Plaintiff its costs and attorneys' fees as provided by 15 U.S.C. § 15; and

IV. Granting such further and different relief as the Court deems just.

## COUNT II

## SHERMAN ACT, MONOPOLIZATION

50. Plaintiff realleges paragraphs 1 through 46.

51. Beginning in 1979 and continuing through at least 1983, the Defendants monopolized the hauling and disposal of sludge in the market consisting of the DWWTP, in violation of 15 U.S.C. § 2.

52. The Defendants combined to unlawfully permit, acquire and maintain a monopoly over the disposal of DWWTP sludge by participating in one or more of the following acts:

(a) Creating a shell corporation for the purpose of hiding interests in Vista;

(b) Deceiving the public and the City Council of Detroit as to those persons holding interests in Vista;

(c) Submitting false and fraudulent information regarding PC 483;

(d) Utilizing and exercising the influence of public officials to surreptitiously obtain PC 483, exclude competition for PC 483, and raise the prices under and extend the time periods of PC 439 and PC 483;

(e) Fixing the price for disposal of DWWTP sludge; and

(f) Bribing Beckham.

53. Plaintiff has been injured in its property and business in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by Defendants' unlawful conduct.

WHEREFORE, Plaintiff prays for entry of judgment against all Defendants, jointly and severally:

I. Permanently enjoining the conduct alleged above;

II. Awarding Plaintiff its damages trebled as provided by 15 U.S.C. § 15;

III. Awarding Plaintiff its costs and attorneys' fees as provided by 15 U.S.C. § 15; and

IV. Granting such further and different relief as the Court deems just.

## COUNT III

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

54. Plaintiff realleges paragraphs 1 through 46.

55. This is a civil action brought by Oakland County against Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961, et. seq.

56. Plaintiff Oakland County is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

57. Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit are persons within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

58. Vista is an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c) which engaged in, and the activities of which affected, interstate commerce within the meaning of 18 U.S.C. §§ 1962(c).

59. Michigan statutes (MCLA § 750.117 and § 750.118) make it a felony to bribe a public officer, agent, servant, or employee in order to influence such person's actions, and also make it a felony to accept such bribe.

60. At all times relevant herein, Article 2, Section 2-106, paragraphs one and two, of Detroit's Charter prohibited elective officers, appointees and employees from participating in any matter on behalf of Detroit if such person had a conflict of interest. These provisions are shown by Exhibit "A" attached.

61. At all times relevant herein, Article 20 of contract PC 483 contained specific provisions to require disclosure of conflicts of interest, and to prevent contracts with Detroit if a conflict of interest was present concerning any transaction. These provisions are shown by Exhibit "B" attached.

62. Users of services provided by the DWSD have a right to have Detroit, acting through its public officials, agents and contractors, conduct the business of the DWSD in accordance with Detroit's established procurement procedures as referred to in paragraph 35 hereof, *Standards* of *Conduct* as referred to in paragraph 60 hereof, contract provisions relating to *Conflict* of *Interest*, as referred to in paragraph 61 hereof, the laws of the State of Michigan, as referred to in paragraph 59 hereof, and to, in all other manners and respect, have the business of the DWSD, and in particular, the DWWTP, conducted honestly, fairly and impartially, free from corruption, collusion, partiality, disloyalty, undue influence, conflicts of interest, favoritism, bribery and fraud.

63. Notwithstanding the foregoing, Beckham, Bowers, Ferrantino, Cusenza, Valentini, Carson, Tomyn, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit knowingly, willfully and unlawfully performed the acts described in

paragraphs 26 through 46 as a scheme and artifice that they had devised and intended to devise:

(a) To defraud the users of services provided by the DWSD of their right to have the business of the DWSD conducted honestly, fairly, impartially, free from corruption, collusion, partiality, disloyalty, dishonesty, undue influence, conflicts of interest, favoritism, bribery and fraud;

(b) To obtain Contract PC 483 and monies paid thereunder by means of false and fraudulent pretenses, representations, and omissions of material facts, knowing and intending that the pretenses, representations and omissions were false, fraudulent and material when made or omitted, and for the purpose of obtaining the aforesaid contract and monies; and

(c) To (i) circumvent the DWSD's decision that having a single contractor for sludge disposal was a serious disadvantage to system users, (ii) perpetuate the monopoly of Michigan Disposal, Wayne Disposal and Ferrantino, (iii) exclude competition for the disposal of sludge from the DWWTP, (iv) fix the price for those services, and (v) maximize profitability of operations under PC 439, all by means of false and fraudulent pretenses, representations, and omissions of material fact knowing that said pretenses, representations and omissions were false, fraudulent and material when made or omitted.

64. Beckham, Bowers, Ferrantino, Valentini, Cusenza, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, for the purpose of executing the aforementioned scheme and artifice, knowingly and repeatedly caused the mails to be used including, but not limited to, the following instances:

| DATE | DESCRIPTION |
|---|---|
| August 8, 1980 | An envelope containing a letter dated August 8, 1980 from the Water and Sewerage Department, City of Detroit signed by the Director, Charles Beckham, advising |

| | |
|---|---|
| | Vista that it was selected to submit a formal proposal for the hauling and disposal of sludge at the Wastewater Treatment Plant, addressed to Jerry B. Owens, Vista Disposal, Inc., 1880 City National Bank Building, Detroit, Michigan 48226. |
| October 22, 1980 | An envelope containing a letter dated October 22, 1980, from the Water and Sewerage Department, City of Detroit signed by the Director, Charles Beckham, directing Vista to begin work under Contract No. PC 483 addressed to Vista Disposal, Inc., 1880 City National Bank Building, Detroit, Michigan 48226. |
| November 18, 1980 | An envelope containing a financial statement which indicated a security interest was obtained by Wolverine Disposal, Inc. in certain types of property of Vista Disposal, Inc. addressed to U.C.C. Unit, Secretary of State, Lansing, Michigan. |

In addition, from on or about April 2, 1981, through at least December 10, 1981, Beckham, Bowers, Ferrantino, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit caused checks issued by Detroit and made payable to Vista Disposal, Inc. to be delivered by mail to Vista at 313 Michigan Avenue, Detroit, Michigan 48226.

65. Defendants Beckham, Detroit, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit were employed by or associated with the enterprise referred to in paragraph 58 and conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs, through a pattern of racketeering activ-

ity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is,

(a) Mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, or

(b) Bribery, in violation of MCLA § 750.117 and § 750.118.

66. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(c) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of its sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

## COUNT IV

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT CONSPIRACY

67. Plaintiff realleges paragraphs 1 through 46 and 55 through 64.

68. Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit conspired to violate 18 U.S.C. § 1962(c) by agreeing to conduct or participate in the affairs of the enterprise referred to in paragraph 58 through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(A) or (B) and (5), that is,

(a) Mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, or

(b) Bribery, in violation of MCLA § 750.117 and § 750.118.

69. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(d) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of its sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

## COUNT V

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

70. Plaintiff realleges paragraphs 1 through 46 and 59 through 64.

71. This is a civil action brought by Oakland County against Detroit and Beckham under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961, et. seq.

72. Plaintiff is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

73. Defendants Detroit and Beckham are persons within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

74. The DWSD is an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c) which engaged in, and the activities of which affected interstate commerce within the meaning of 18 U.S.C. § 1962(c).

75. Detroit and Beckham were employed by or associated with the enterprise referred to in paragraph 74 and conducted or participated, directly or indirectly, in the conduct of the DSWD's affairs through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is, bribery, in violation of MCLA § 750.118 or mail fraud in violation of 18 U.S.C. 1341 and 18 U.S.C. § 2.

76. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(c) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of its sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the

direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Detroit and Beckham, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c);

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

## COUNT VI

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

77. Plaintiff realleges paragraphs 1 through 46 and 59 through 64.

78. This is a civil action brought by Oakland County against Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961, et. seq.

79. Plaintiff Oakland County is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

80. Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit are persons within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

81. Vista, Michigan Disposal, Wayne Disposal, Wolverine, Wolverine-Detroit and Vista/Wolverine, for the common pur-

pose of accomplishing the objectives of paragraph 63, were associated in fact and constituted an enterprise within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c), which engaged in and the activities of which affected interstate commerce.

82. Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit were employed by or associated with the enterprise referred to in paragraph 81 and conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs, through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is, bribery in violation of MCLA § 750.117 or mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2.

83. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(c) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

## COUNT VII

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT CONSPIRACY

84. Plaintiff realleges paragraphs 1 through 46 and 59 through 64 and 78 through 81.

85. Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit conspired to violate 18 U.S.C. 1962(c) by agreeing to conduct or participate in the affairs of the enterprise referred to in paragraph 81 through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is, bribery in violation of MCLA § 750.117 or mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2.

86. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(d) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

## COUNT VIII

## BREACH OF FIDUCIARY DUTY

87. Plaintiff realleges the allegations contained in paragraphs 1 through 46, and 59 through 64.

88. Young, as Court-appointed Administrator of the DWWTP, was charged with managing all of the property of the DWWTP, in the same manner and to the same extent as DWWTP was charged, all in accordance with the laws of the State of Michigan. Young may be sued with respect to any of his acts, transactions or omissions in carrying on the business connected with DWWTP and its property pursuant to 28 U.S.C. § 959.

89. Pursuant to his appointment and the laws of the State of Michigan, Young, as a Court-appointed Administrator, owed a fiduciary duty of confidence, loyalty, good faith and fair dealing to Oakland County. This fiduciary duty required Young to act in an impartial manner concerning all property and administrative duties placed under his management, and to at all times manage and administer the DWWTP in accordance with applicable laws and the Order which appointed him Administrator.

90. Young breached the fiduciary obligations owed to Plaintiff by virtue of the following acts and omissions:

(a) Young abused his powers as Administrator by effectively restricting consideration of available bidders on PC 483 to one bidder.

(b) Young abused his powers as Administrator by failing to deal at arm's length when awarding contract PC 483 to a friend and by concealing this fact from the public.

(c) Young abused his powers as Administrator by executing PC 483 when Young knew, or reasonably should have

known, (i) that the bidder information and contract data submitted by Vista was false, and that Vista was incapable of independently providing the service proposed, (ii) that the rates of compensation contained in that contract were extravagant and wasteful, and (iii) and that officials, agents and servants of Detroit had negotiated and proposed this contract in violation of federal laws, state laws and charter provisions.

(d) Young abused his powers as Administrator by allowing the costs charged under contracts PC 439 and PC 483 to be arbitrarily and capriciously raised after those contracts were in place without regard to the pre-existing contractual rights of Detroit, and did so without the benefit of competitive bidding to support the reasonableness of those increases.

(e) Young abused his powers as Administrator by arbitrarily and capriciously agreeing to extend the time periods of contracts PC 439 and PC 483.

(f) Young abused his powers as Administrator by failing to maintain and use sufficient accounting, auditing, investigatory and operating guidelines and procedures to promptly discover and then eliminate inefficient, wasteful, false and unlawful costs and expenses which PC 439 and PC 483 imposed on the sewage disposal system.

(g) Young abused his powers as Administrator by continuing to honor PC 439 and PC 483 long after he knew or reasonably should have known that said contracts were the result of fraud, that bribery and the corruption of public officials had occurred, and that said contracts were wasteful.

91. At no time prior to public disclosure of the indictments in *U.S. v. Beckham, et. al.*, Criminal No. 83-CR-60070-DR, did Young divulge to Oakland County or its officials, agents, employees, or attorneys the breaches of fiduciary duty described above.

92. Plaintiff has been injured in its property and business in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct

and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by Young's breaches of fiduciary duty.

WHEREFORE, Plaintiff prays for entry of a judgment against Young:

I. Awarding Plaintiff its damages in such sum as the evidence may show is due, together with interest, costs and attorney fees.

II. Granting Plaintiff such further and different relief as the Court deems just.

PHILIP G. TANNIAN, P.C.

By: /s/ PHILIP G. TANNIAN
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By: /s/ ROBERT H. FREDERICKS, II
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COHEN, GETTINGS, ALPER AND
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BUTLER, RUBIN, NEWCOMER,
SALTARELLI & BOYD

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## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

THE COUNTY OF OAKLAND, by GEORGE W. KUHN, the Oakland County Drain Commissioner,

*Plaintiff,*

*vs.*

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the Estate of MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL, INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL-DETROIT, INC.,

*Defendants.*

Case No. 84-CV1068-DT
Hon. Richard F. Schrheinrich

## AFFIDAVIT OF ROBERT H. FREDERICKS II IN SUPPORT OF THE MOTION TO ALTER JUDGMENT

ROBERT H. FREDERICKS II, being sworn, declares:

### GENERAL BACKGROUND

1. Based on my personal knowledge and observation, I can testify as to the following facts:

2. I am currently the Chief Deputy Drain Commissioner for Oakland County and have held that position since April 13, 1976.

3. In 1942 (and as amended in 1958), pursuant to Mich. Comp. L. Ann. 46.171 et seq. ("Act 342"), the Oakland County Board of Supervisors adopted a resolution which established the "Southeastern Oakland County Sewage Disposal District" (S.O.C.S.D.D.) for the purpose of creating a system of sewer and sewage disposal improvements and services for the various municipalities so named. In addition, that resolution designated the Oakland County Drain Commissioner as the "County Agency" for that district.

4. The "County Agency", pursuant to Mich. Comp. L. Ann. 46.173, is charged with "the supervision and control of the management and operation of all improvements, facilities and services" established pursuant to that Act. In addition, the County Agency has the duty *inter alia* "to obtain or prepare data for and determine rates, charges and assessments to be imposed and collected for any improvements, facilities, and services authorized . . . " and "to review and make adjustments of rates, charges, and assessments where the same are deemed excessive or inadequate; (and) to engage consultants, assistants, attorneys, and employees".

5. Oakland County, pursuant to Mich. Comp. L. Ann. 123.731 et seq. ("Act 185"), established the Evergreen-Farmington Sewage Disposal District in 1957 (and as amended in 1958), and the Clinton-Oakland Disposal District in 1967 for the purpose of disposing of the sewage from those districts and the municipalities which are constituent members of those Districts.

6. Pursuant to the provisions of Miscellaneous Resolution No. 7991 adopted by the Oakland County Board of Commissioners on June 2, 1977, the County Drain Commissioner was authorized to represent the interest of the County and the three above named sewage disposal districts in connection with litigation then pending in the United States District Court entitled *United States* vs. *City of Detroit, et al.*, Civil Action No. 77-71100.

7. Pursuant to the provisions of Miscellaneous Resolution No. 84047 adopted by the Oakland County Board of Commissioners on March 8, 1984, Oakland County authorized the filing and prosecution of this lawsuit in the name of the County with respect to the three above named sewage disposal districts.

**OAKLAND COUNTY IS NOT A "MERE CONDUIT"**

8. Oakland County constructed, owns, operates and maintains the sewer systems which connect the municipalities' systems to the Detroit wastewater treatment system. To provide this and other related services the County maintains a staff of approximately 150 persons.

9. Pursuant to Act 342 and Act 185, the County has issued bonds for the construction of sanitary interceptor sewers for which the County has pledged its full faith and credit. For example:

(a) S.O.C.S.D.D. Dequindre interceptor, Bond Resolution No. 4060, dated November 7, 1962.

(b) Clinton-Oakland, Paint-Creek Interceptor, Bond Resolution No. 5433, dated July 2, 1970.

(c) Evergreen-Farmington: Misc. (bond) Resolution 3494, dated February 24, 1959.

10. The County has also issued bonds in its name and pledged its full faith and credit for improvements to the lateral sewage systems for the various municipalities. For example: Waterford Township Extension, Oakland County Bond Resolution No. 8343, dated February 16, 1978.

11. Oakland County has entered into three separate contracts with the City of Detroit for the disposal and treatment of the sewage flows originating within each of its three sewage disposal

districts: Evergreen-Farmington (December 30, 1958); S.O.C.S.D.D. (November 23, 1942, renewed November 1, 1962); and Clinton-Oakland (February 5, 1968).

12. Oakland County has entered into two additional contracts with the City of Detroit for the use of certain city sewers with regard to the Evergreen-Farmington District (dated December 30, 1958) and the S.O.C.S.D.D. (dated November 28, 1962).

13. Oakland County owes an obligation to its constituent municipalities to obtain for its sewage disposal districts, sewage disposal services at the best possible cost from the City of Detroit. Such a duty requires Oakland to monitor and participate, where feasible, in Detroit's complex rate making system. Obtaining the best possible cost and monitoring Detroit's rate making system are two of the principal sewer related activities performed by the County.

14. In computing its rates, Detroit utilizes computer-driven rate models to accommodate volumes of accounting, engineering, and economic data as well as complex formulas used for calculating estimates and projections. In determining its costs, Detroit considers a number of factors including (but not limited to), costs incurred at the Sewage Treatment Plant (e.g. sludge disposal costs), as well as costs that result from special service to particular customers (e.g. costs associated with Detroit's intra-city service or costs associated with the Oakland-Macomb Interceptor System) which are assigned directly to those contracting parties. The imperfect nature of this complex process is evidenced by the necessity to provide a "look back" adjustment procedure to correct estimates and projections as well as by the fact that Detroit's rates have been challenged by Oakland County every year since 1975. It is Oakland that brings the challenges, not the municipalities or Oakland's individual rate payers.

15. The City of Detroit bills the Clinton-Oakland District and the Evergreen-Farmington District based on the master sewer

meter readings at the point(s) of connection between Detroit and the Districts. The S.O.C.S.D.D., pursuant to its contract, prepares its own statement of what is owed, based on water consumption readings and storm water calculation, and sends that to Detroit with payment. These arrangements allow Detroit to bill the Districts without regard to how billings are computed and collected at the municipal level.

16. (a) The computation of billings sent to municipalities by the Districts is a complex process involving different methods of calculating volumes of sewage based on water consumption and other data. For example:

(i) Clinton-Oakland charges a flat rate per the total number of "units" connected in accordance with a unit assignment factor schedule developed by the County. This is necessary because of the large number of users in that District without metered water supplies. When water consumption metering is available in that District, a flat rate per 1000 CF is charged. Penalties are charged if a municipality demonstrates "peak flows" over limits established by the County.

(ii) In the Evergreen-Farmington District, bills to municipalities are based on master water meter readings if available. If not available, then by individual water meter readings multiplied by a factor of 1.108. If no water meter readings are available, then charges are based on "unit" factors developed by the County. Some municipalities in Evergreen-Farmington also receive a storm water charge.

(iii) In the S.O.C.S.D.D., the charges are based on master water meter readings. In addition, because that District has combined sanitary/storm sewers, a storm water charge is made based on an average of the previous ten-years of residual (non-sanitary) flows.

(iv) Clinton-Oakland and Evergreen-Farmington bill municipalities quarterly while S.O.C.S.D.D. bills municipalities monthly. All Districts bill for High Strength Surcharges and Non-residential flow surcharges where applicable. To com-

pound this rate making complexity, some municipalities are partially located in two different districts and receive two different billings from the County.

(v) To the charge received from Detroit, all of the Districts add a charge for their own operating and maintenance costs as well as a charge for contribution to a reserve fund.

(b) Regardless of the method of calculation, the County's collection of and administration of money from the municipalities follows procedures established by the Municipal Finance Officers Association as prescribed by the Michigan State Treasurer (See Mich. Comp. L. Ann. 141.421), which require the use of an enterprise fund method. Oakland, therefore, collects the sewage treatment charges which have been billed to the municipalities and deposits such receipts with the County Treasurer in the County's name. Importantly, the County maintains separate, segregated accounts ("Funds") which reflect the receipts collected for each sewer district. Oakland administers those Funds and pays Detroit's sewage treatment bills from those Funds. Oakland pays Detroit out of those funds without regard to whether the municipalities pay in full or on time. Any recovery by Oakland in this litigation will be credited to the Funds.

17. In addition to its District obligations, Oakland County has contracted with four municipalities, Keego Harbor, Bloomfield Hills, Farmington Hills and Bingham Farms, to actually operate those municipalities' own water/sewer systems. Such operation includes user billing, collections, connections, maintenance; i.e. all operating functions normally provided by a municipality. The County even calculates the appropriate municipal sewage rate for adoption by these municipalities.

18. Oakland County is incidently, an end user and rate payer of the County System. Wastes from County buildings are discharged into municipal systems which are part of the three Dis-

tricts. Oakland County pays the respective municipalities for their services just as any other user.

19. To a great extent, all the municipalities in the three districts rely on the expertise of Oakland with regard to: (a) the technical and physical operation of the systems; (b) the determination of whether the Detroit rate is fair in amount and properly allocated among the different customer classes; and (c) the administrative/legal aspects. For example, Oakland County coordinates the participation of the municipalities in the system by preparing uniform engineering specifications, billing procedures (per District), and uniform resolutions for each municipality to adopt.

## MUNICIPAL SEWER SYSTEMS SUFFER NO MORE INJURY THAN OAKLAND COUNTY

20. The Southeast Oakland County Sewage Disposal District consists of the following municipalities: Royal Oak, Troy (i.e. that portion not included in Evergreen-Farmington), Southfield (i.e. that portion not included in Evergreen-Farmington), Royal Oak Township, Pleasant Ridge, Oak Park, Madison Heights, Huntington Woods, Hazel Park, Ferndale, Clawson, Birmingham (i.e. that portion not included in Evergreen-Farmington), Berkley, and the village of Beverly Hills (i.e. that portion not included in Evergreen-Farmington).

21. The Evergreen-Farmington Sewage Disposal District consists of the following municipalities: Birmingham (that portion not included in S.O.C.S.D.D.), Bloomfield Hills, Farmington, Farmington Hills, Keego Harbor, Lathrup Village, Southfield (i.e. that portion not included in S.O.C.S.D.D.), Troy (i.e. that portion not included in S.O.C.S.D.D.), Bloomfield Township, Auburn Hills (i.e. that portion not included in Clinton-Oakland), West Bloomfield (i.e. that portion not included in Clinton-Oakland), and the village of: Beverly Hills (i.e. that portion not included in S.O.C.S.D.D.), Bingham Farms, and Franklin.

22. The Clinton-Oakland Disposal District consists of the following municipalities: Novi, Orchard Lake Village, Rochester Hills, Independence Township, Oakland Township, Orion Township, Oxford Township, Auburn Hills (i.e. that portion not included in Evergreen-Farmington), Waterford Township, West Bloomfield Township (i.e. that portion not included in Evergreen-Farmington), and the villages of: Clarkston, Lake Orion, and Oxford.

23. Based on my familiarity with the thirty-five municipalities listed above:

a. Each municipality owns and maintains (or contracts for maintenance by the County) a sewer system which connects to the County's system.

b. Each municipality uses the rate charged by Oakland as a base for the rate charged by the municipality to the user, to which is added an additional charge to cover local municipal cost of operation and maintenance as well as a provision for contribution to a reserve fund.

c. Each municipality pays sewage disposal charges from a segregated account supported exclusively by money collected from sewer system users. The payments, when made, are deposited with the County Treasurer.

24. In summary, the County Treasurer obtains the necessary funds to pay Detroit from bills sent by the Districts to the municipalities, and the municipalities in turn obtain their funds by bills sent to the end users. The users pay the municipalities, which maintain segregated sewer accounts, and from those accounts the municipalities pay the County Treasurer, who maintains segregated Funds for each of the Districts. As such, the municipalities "pass through" sewage treatment costs directly to the users.

## IT IS MORE DIFFICULT FOR THE MUNICIPALITIES TO DETERMINE THEIR DAMAGES THAN FOR THE COUNTY

25. The municipalities receive bills from Oakland County based on different methods of calculating charges. The different methods depend on the District(s) in which the municipalities are located, whether they have combined sewer/storm drains, and whether they "overlap" Districts.

26. The municipalities have no contractual relationship with Detroit; further, they have fewer resources and less expertise to combat overcharges and have relied on Oakland County in the past to challenge excessive rates charged by Detroit.

27. The City of Detroit has contracted with Oakland and, as a practical matter, looks to Oakland for administration and payment without regard to how the individual constituent municipalities are billed.

/s/ ROBERT H. FREDERICKS II
Robert H. Fredericks II

Subscribed and sworn to before me
November 11, 1985

/s/ KIMBERLY ANN YOUNG
Notary Public
County of Wayne, Michigan
My Commission Expires: August 26, 1986